IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 32.

LUCKENBACH STEAMSHIP COMPANY, INC.,
Appellant,

vs.

THE UNITED STATES.

PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the United States Supreme Court.

The appellant respectfully shows to the Court as follows:

This is an appeal from the Court of Claims decided by this Court on November 23, 1926, affirming the judgment, the opinion by Mr. Justice Van DeVanter.

It is perfectly clear that the position of appellant was misconceived by this Court. This is shown by the opinion:

> "The presentation of the case on behalf of the Claimant has proceeded on the assumption that our power to review is as broad as the power of the Court of Claims to hear and determine in the first instance."

Appellant's counsel has been unfortunate if it has presented the appeal in this case in such manner as to justify such a conclusion by this Court. The fact that such an impression exists in the minds of the Court, makes it imperative that the basis of this appeal be examined by the Court—if justice is more important than technical forms.

I.

The Act of Congress of June 15, 1917 is the authority under which Claimant's tugs and barges were commandeered and taken. There is nothing in the act that confines the Court of Claims to consideration of the facts—but the court is required to consider questions of fact and apply the law to the facts—and it is bound by the law just as are other courts established by the Government.

This Act of Congress was passed to facilitate the necessary activities of the Government in conducting the war. It was never intended to be used as an instrument for confiscation. The constitutional right of the citizen whose property the Government takes for public use justifies the demand that he be protected by the law. It is only when those whose duty it is to administer or construe the law fail to safeguard the interest of the citizen and respect his constitutional rights that property is taken without making the "just compensation" that the Constitution guarantees.

Under the judgment rendered by the Court of Claims the property of Claimant, it is respectfully submitted, has been confiscated in violation of the law and in contempt of the plain mandate of the Constitution.

Claimant has not received "just compensation"—not even according to the facts found by the Court of Claims—which were based solely on the findings of the Board of Appraisal.

Claimant is entitled to have its right to "just compensation" determined by law—which has been understood to be a "rule of action", and not the mere opinion of employees of the Government whose ambition it seems to be to withhold from the citizen as large a portion of the value of property taken as possible.

II.

The opinion (p. 6) says there is no showing that, "in conformity to the 5th rule before quoted, Claimant tendered ("twenty-seven additional findings" embraced in motion for new trial and request for amended findings) "and if that was not done the Claimant was not in position to press them."

Rule V quoted by the Court reads as follows:

> "In every such case, each party, at such time *before trial*, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact."

Request, in conformity with this rule, was tendered "*at such time before trial and in such form as the court prescribed.*"

The opinion also cites Act of Congress of February 13, 1925, as applicable to this action. The learned Justice

delivering the opinion was evidently not advertent to the fact that Claimant could not take advantage of the provisions of the act—which was evidently brought about because of injustice done by reason of the failure of the Court of Claims to find facts upon which an appellate court could intelligently review the judgments of the Court of Claims and apply the law applicable thereto.

The attention of the Court is called to the fact that this action was filed in the Court of Claims on May 6, 1918, and judgment of the Court of Claims filed April 28, 1924 and the appeal filed in this court November 18, 1924, all before the Act of Congress of 1925 cited in the opinion was passed.

The opinion is evidently based on the assumption that Claimant could, under the provisions of this act, demand that "the facts be specifically found," it became the duty of the Court "to make and enter special findings of fact as a part of its judgments," and that Claimant did not so request "at the time the case is submitted," a "party aggrieved by the judgment, not later than twenty days after its rendition", could "request the court in writing to find the facts specifically; and thereupon it shall be the duty of the court to make special findings of fact in the case and, by an appropriate order, to make them a part of its judgment," which "shall be in the nature of a special verdict, and shall set forth the ultimate facts found from the evidence, but not the evidences from which they are found."

If the Act of Congress of 1925 had been in force at the time this case was before the Court of Claims, this Claimant could have demanded that the facts be *specifically* found and made a part of the judgment for review.

Since the act was not in existence, Claimant took every means open to it to induce, persuade or force the Court of

Claims to determine the issues on the evidence in the record and *find the facts* upon which the law should be applied and the judgment based.

It is only just to the learned Justice delivering the opinion of the court to assume that it was by reason of his understanding that the Act of Congress of February 3, 1925 was at that time in force that Claimant could have forced the Court of Claims "*to find the facts specifically*" that it is affirmed that as this was "not done, and Claimant was not in a position to present"—request for specific findings of fact.

This act was passed long after the judgment of the Court of Claims was rendered and the case appealed to this Court. It was not in force and to permit it to be used to the injury of Claimant and provide an "escape" for an unjust judgment that confiscates Claimant's property is an injustice that this Court will not countenance, it is respectfully submitted.

III.

Appellant assumes that:

1. This Court is more interested in seeing that the provision of the Constitution guaranteeing "just compensation" for private property taken, is of greater force than rules made by the Court of Claims for the guidance of clerks;

2. The Court of Claims is a Court and not an administrative department of the Government, and is bound by the rules of evidence by which Federal Courts are bound.

3. This court has the same power to review the judgments of the Court of Claims that it has to review the judgments of the United States Circuit Court of Appeals; that its uniform holding that the Court of Claims must apply the "rules of evidence" carries with it the duty and the power of this court not to surrender its power but to enforce these rules of evidence when the Court of Claims refuses to be bound thereby;

4. Interest is necessarily a part of compensation to which one whose property has been commandeered and taken by the Government when payment of the "just compensation" found is not paid or tendered *when* determined and the property taken.

5. The Government has no right to pay a railroad corporation interest and withhold it from Claimant simply because it tries its action in the Court of Claims, whereas the railroad company tries its action in another court established by the Government. (Seabord Air Line Ry. Co. *vs.* United States, 261 U. S. 299);

6. The Government has no right to discriminate against Claimant and grant the Standard Oil Company relief refused Claimant, on the basis that Claimant brought its action in the Court of Claims, while the Standard Oil Company brought its action in a different court established by the Government. (Standard Oil *vs.* Southern Pacific, 265 U. S. 564.)

IV.

The Court of Claims was established by the Government as a forum in which could be determined the "just compensation" to which the citizen is entitled for his property taken by sovereign power for public use.

The court says in the opinion in this case (p. 2): "there is no right to bring these suits against the United States" except "as Congress has consented" and "therefore" "the right" is "subject to such restrictions as Congress has imposed."

(1) The court in reviewing the "restrictions" imposed by Congress cites specifically: (a) "trial shall be by the Court without a jury" and (b) "appellate review" is forbidden when "the decision was against the Claimant and the amount in controversy was not in excess of three thousand dollars"; (c) "appellate review is not essential to due process of law, but is a matter of grace"; (d) appellate jurisdiction of this court shall be subject to "such exceptions" and be exercised under "such regulations" as *Congress may* prescribe.

By "grace" appellate review of this case has been granted; "the amount in controversy" exceeds "three thousand dollars"; Congress has made no exception "or regulation" excluding application of the rules of evidence.

This Court has uniformly held that the rules of evidence must govern the Court of Claims and Mr. Justice Pitney in delivering the opinion of the Court in Brothers *v.* U. S. (252 U. S. at p. 93), says:

> "For the purpose of our review, the findings of the Court of Claims are to be treated like the verdict of a jury."

The opinion cites as a rule controlling:

> "A finding by the Court of Claims of the facts of the case, established by the evidence, is in the nature of a special verdict."

(2) The record in the case as certified to this Court finds the facts:

(a) The tugs and barges known as the "Luckenbach fleet" were requisitioned and appraised on or about August 29th, 1917; and their value determined by the President at $1,500,000;

(b) Claimant was informed by letter dated October 4th, 1917, that commandant had been ordered to pay it that sum upon proof of ownership, "*if the condition of the vessels was the same as they were when theretofore inspected by the Government*";

(c) On October 8th, 1917, commandant was directed to take possession, "*owner Luckenbach Steamship Company*, giving to the owners, or their representative, a receipt for the ships," and pay said amount in full of just compensation, upon satisfactory proof of ownership and execution and delivery by the company of formal bill of sale—"*if they were in the same material condition as when inspected*";

(d) Said vessels were taken possession of by the Government; the tugs October 12th and the barges October 18th, 1917;

(e) An inspection or resurvey of them was made by the Government on October 17th, 1917, "*to determine whether they were in the condition specified by the Secretary of the*

Navy as a requirement for the payment of the compensation fixed by the President";

(f) On October 27th, 1917, Claimant executed and delivered to the United States bill of sale for all the tugs and barges;

(g) On December 7th, 1917, Claimant was paid 75% of the sum determined by the President on August 29th, 1917 as just compensation;

(h) At and for some time prior to the time said vessels were taken possession of by the Government, *all of them were in possession of Claimant and operated by it;* two of them owned by it, the remainder being the property of individual members of the Luckenbach family—all of whom conveyed their interest to Claimant October 19th to 24th inclusive, before Claimant delivered bill of sale to the Government on October 29th, 1917.

V.

The facts found by the Court of Claims as certified in the record show that the Luckenbach fleet was for all practical purpose taken from Claimant on August 29th, 1917. After Claimant's property had been commandeered at that time by order of the Government, it was out of the power of Claimant to do business with its fleet—its income ended and common honesty demands payment on that date, or interest until paid.

Payment of 75% of the amount of just compensation determined by the President on August 29th, 1917 was not made until December 7th, [redacted]—three months and nine

days after commandeered and Claimant's business destroyed; one month and twenty-five days after the tugs and one month and nineteen days after the barges were taken possession of; and one month and eighteen days after the resurvey *"to determine whether they were in the condition specified by the Secretary of the Navy as a requirement for the payment of the compensation fixed by the President."*

VI.

The opinion of the Court herein discloses the fact that the learned Justice was not advertent to some of the facts found by the Court of Claims as appearing in the certified record.

The Opinion (p. 7) says:

> "In short, while the United States was *prepared, willing,* and *offering when* the vessels were taken over to pay the sum now adjudged to have been just compensation at that time, the Claimant was not then in a position at the time to demand or receive compensation because as yet it was without good title and had not executed the bill of sale to the United States."

The record as certified is at variance with the alleged facts stated in the opinion, it is respectfully submitted.

Was the Government *"prepared"*, *"willing"*, and *"offering"*, to "pay the sum now adjudged to have been just compensation at that time"—October 12th and 18th, 1917?

The record says otherwise.

At the time the tugs and barges were taken possession of by the Government, the record shows that instead of being "*prepared*", "*willing*", and "*offering*", to pay for the property taken by sovereign authority and power, that there was no intent of paying at that time the amount theretofore determined as just compensation.

The authority to pay the compensation determined had "a string tied to it" and the money could not at that time be paid to Claimant although its business was destroyed and its property taken.

The authority to pay the sum determined as just compensation did not exist and the money could not be paid *until there was a resurvey of the tugs and barges taken, and the fact found that they were in the same condition as they were when theretofore inspected by the Government.*

This was a condition precedent to the payment specified by the Secretary of the Navy as a requirement and one that the defendant alone could meet.

The record directly and unequivocally contradicts the statement that the United States was "*prepared*", "*willing*", and "*offering*", to pay the sum now adjudged to have been just compensation at the time "*when*" the vessels were taken over.

Does the record bind the Court or is claimant alone bound so that facts in its favor are excluded?

This second survey, according to the record, was made on or about October 17, 1917, for the purpose of ascertaining if the barges and tugs taken by the Government were in the same condition "as when theretofore inspected by the Government."

The opinion admits that some six weeks elapsed after the delivery of the bill of sale before payment was tendered or made of 75% of the amount adjudged as just compensation at the time vessels were taken. The record shows that the tugs and barges were separately valued.

VI.

According to the findings by the Court of Claims as certified in the record some time elapsed from the (a) commandeering of the vessels and fixing the just compensation at that time; (b) and from the time of taking possession of the vessels, (c) to the time that Claimant had opportunity to receive the amount determined as just compensation.

If the Seaboard case has not lost its force in this court, Claimant was entitled to receive interest, in any event, covering that interval of time. To deny this, it is submitted, is equivalent to repudiating the doctrine declared in the Seaboard case.

Claimant is entitled, it is respectfully submitted, on the "limited review on questions of law" which this court holds Congress has granted, to have "the findings of the Court of Claims treated like the verdict of a jury."

Whether there is *any* evidence to sustain the verdict found by a jury, is a "*question of law*" that this Court considers at almost every term of the Court on appeal reviewing the judgment based on such verdict rendered in a Circuit or District Court.

Is there any act of Congress that makes the findings of fact of the Court of Claims superior to the verdict of a jury

in the Federal Courts established under the provisions of the Constitution?

Is the Court of Claims bound by the rule cited by the Court on Page 3 of the decision, that the facts found are in the "nature of a special verdict" established "by the evidence."

If the findings of fact by the Court of Claims are in the "nature of a special verdict," then whether or not the same is "established by evidence" is a question of law. Has this Court no power to consider this question of law?

There is no act of Congress so "limiting" this Court.

If the power of this Court is so limited and hedged about that the Court of Claims may, without danger of review, certify as a fact that which is not supported by the evidences but is in conflict with the same, and thereby deprive the citizen of his property, then the Court of Claims is superior to this Court.

Is this Court ready to declare such to be the law?

It is respectfully submitted that the questions of law involved in this action are fundamental and far reaching. If the Court of Claims is clothed with the Czarlike power that the judgment in this case appears to hold, then the fact should be known so that this "Frankenstein" which Congress has created by the establishment of the Court of Claims may be shackled even more than it has been by the act of February 13, 1925.

Under any interpretation of the facts found by the Court of Claims, it is respectfully submitted, claimant is entitled to interest from October 29 to December 7, 1917.

Claimant is entitled to have the judgment of the Court of Claims reviewed without having its position misunderstood and the argument of its counsel misconceived.

Wherefore, your Petitioner respectfully prays for a rehearing of the appeal which was herein granted.

Luckenbach Steamship Company, Inc.,
Appellant,

By Peter S. Carter,
C. C. Daniels,
Attorneys for Appellant.

Of Counsel,
Peter S. Carter,
5 Whitehall Street,
New York City.

C. C. Daniels,
36 West 44th Street,
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SOUTHERN DISTRICT OF NEW YORK, }
UNITED STATES OF AMERICA, } ss.:

ROBERT C. THACKARA, being duly sworn, says that he is Vice President of the Luckenbach Steamship Company, Inc., petitioner herein; that he has read the foregoing Petition and knows the contents thereof and that the same is true to the best of his knowledge and belief.

ROBERT C. THACKARA.

Sworn to before me this 24th }
day of December, 1926. }

The undersigned each for himself hereby certifies that he has examined the foregoing petition, and that in his opinion the same is well founded and entitled to the favorable consideration of this Court, and that it is presented in good faith and not for delay.

Dated: New York, December 24, 1926.

PETER S. CARTER,
C. C. DANIELS,
Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 207

LUCKENBACH STEAMSHIP COMPANY, INC., APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 6–10) is reported in 59 Ct. Cls. 628.

JURISDICTION

The judgment to be reviewed was originally entered April 28, 1924 (R. 10). On June 26, 1924, appellant filed a motion for a new trial and for amended findings, which was seasonably made and entertained by the court. (R. 11.)

While the motion for a new trial was pending and undetermined, appellant filed on July 24, 1924, an application for and gave notice of appeal to this

Court. (R. 11.) On October 20, 1924, the court entered an order overruling the motion for a new trial and simultaneously entered an order allowing the application for appeal. (R. 11.) On November 13, 1924, appellant filed application for and gave notice of an appeal to this Court "from the order herein made on October 20th, 1924, denying and overruling motion of plaintiff for a new trial, and motion to find new and additional findings of fact and conclusions of law." (R. 12.) On November 15, 1924, the court entered an order as follows: "Appeal from the final order of the court allowed by the Court." If the appeal was properly taken, the jurisdiction of this Court is based on Sections 242 and 243 of the Judicial Code as they stood prior to the Act of February 13, 1925. Whether the steps taken resulted in a proper appeal is discussed in the brief.

STATEMENT

This suit was brought in the Court of Claims to recover the value of five tugs and twelve barges acquired by the United States in October, 1917.

The Act of June 15, 1917 (Chap. 29, 40 Stat. 182), provided:

> The President is hereby authorized and empowered, within the limits of the amounts herein authorized * * *
>
> (e) to purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction

> or hereafter constructed, or any part thereof, or charter of such ship.
>
> * * * * *
>
> Whenever the United States shall * * * requisition, acquire or take over * * * any ship, * * * in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.
>
> * * * * *
>
> The word "ship" shall include any boat, vessel, or submarine and the parts thereof.

An appropriation was made to carry out the provisions of this Act.

The appellant is a Delaware corporation. (R. 6.) On August 29, 1917, the Chief of Naval Operations advised the Board of Appraisal of the Navy Department that the President had directed the acquisition of the Luckenbach Fleet, consisting of five tugs and twelve barges, and directed that the Board of Appraisal report to the Secretary of the

Navy what would be just compensation to be paid for each vessel. The Board appraised the vessels and made a report fixing just compensation at $1,500,000 for the fleet, of which $1,184,092 was for the tugs and $315,908 for the barges. (R. 6.) Upon such appraisal and report, the President determined just compensation for the vessels to be the amounts therein specified. (R. 6.)

By a letter of October 4, 1917, the Secretary of the Navy informed the appellant of the amount of just compensation determined by the President and directed the appellant to deliver the vessels to the Commandant of the Third Naval District. The letter also informed the appellant that the Commandant had been ordered to pay appellant the sum of $1,500,000 " upon proof of ownership " and upon the execution by the appellant and delivery to the Commandant " of formal bill of sale of said vessels and their equipment." (R. 7.)

On October 8, 1917, the Secretary of the Navy directed the Commandant to take possession of the vessels, " owner, Luckenbach S. S. Company, giving to the owners, or their representative, a receipt for the ships " and authorized him " to pay to the owner, Luckenbach S. S. Company, upon satisfactory proof of ownership " and the execution by the company of a formal bill of sale, the sum of $1,500,000, and a further sum in payment for ordinary consumable stores. (R. 7.)

The Government took possession of the tugs on October 12, and of the barges on October 18, 1917. (R. 7, 9.) At this time and for some time prior thereto, the appellant had possession of and was operating all these vessels but was the owner of only two of them—tug *No. 5* and the barge *Seneca*. (R. 9.) The remaining fifteen vessels belonged to the individuals described in Finding IV, all members of the Luckenbach family. (R. 9–10.)

Subsequent to the taking of possession by the United States and on October 19 and 24, 1917, the individual owners executed bills of sale of the vessels to the appellant (R. 10).

The appellant was not satisfied with the value fixed by the President and refused to accept it. (R. 7.) On October 27, 1917, the appellant executed and delivered to the United States the bill of sale for the vessels set forth in Finding III. (R. 7–9.) In this bill of sale it was recited that (R. 8):

> Whereas the said tugs and barges were heretofore seized and requisitioned by the United States under the provisions of the act approved June 15, 1917 (Public No. 23), entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes;" and
>
> Whereas Luckenbach Steamship Company, Inc., the owner of said vessels, is dis-

satisfied with the value placed thereon by the President as provided for in the said act and has refused and does refuse to accept the same as fair and just compensation for the said vessels; and

Whereas it is its desire and intent hereby to confirm unto the Government of the United States the title to the vessels so seized and requisitioned by the United States, but reserving to itself all claims for compensation allowed to it by the said act and all rights and remedies for the determination, collection, suit for and recovery of the said compensation for and value of the said vessels.

Now, we, the said Luckenbach Steamship Company, Inc., reserving to itself all of said rights and remedies, does hereby confirm unto the United States the title to the whole of the said tugs and said barges or vessels, together with all machinery, masts, bowsprit, sails, boats, anchors, cables, tackle, furniture, and all other necessaries thereunto appertaining and belonging.

On December 7, 1917, the appellant was paid 75 per cent ($1,125,000) of the sum of $1,500,000 determined by the President to be just compensation. (R. 9.)

The Court of Claims found that: " Just compensation to the plaintiff for the taking by the United States of the aforesaid tugs and barges is the sum of $1,500,000," and it awarded judgment for $375,000. (R. 10.)

On January 27, 1925, the appellant filed in this Court a motion to remand, with directions to the Court of Claims to supplement the record in this Court by the inclusion of the appellant's motion for a new trial and for additional findings, and with a direction to the Court of Claims to reconsider the evidence and to find, or again refuse to find, each of the additional findings of fact requested in the motion previously made in the court below. The court deferred action on the motion to remand until the argument of the case on the merits.

The case presents three questions:

(1) Was the appeal properly taken?

(2) Should the motion to remand for additional findings be granted?

(3) Do the findings as made sustain the judgment?

The last question requires an inquiry into the matter of allowance of interest on the award.

SUMMARY OF ARGUMENT

I. The appeal attempted in July, 1924, was premature and ineffective, because the pendency of the motion for new trial deprived the judgment previously entered of finality. The appeal attempted in November, 1924, from the order denying the motion for new trial and for additional findings was ineffective, because such an order is not appealable. The only way in which the jurisdiction of this Court may be sustained is by assuming

that the appellant intended by the appeal of July, 1924, to abandon and withdraw its motion for a new trial, or to assume that the appeal of November, 1924, was not intended as an appeal from an order denying a new trial, but as an appeal from the previous judgment rendered final by that order. In either case, the assumption as to the intention of the appellant would be directly contrary to his real intention as disclosed by the record.

II. The motion to remand seeks only to require the Court of Claims to reconsider the evidence and to give additional weight to some portions of the evidence. It is merely another way of asking this Court to consider the evidence and overturn the findings of the Court of Claims. There is a finding of fact on every material issue necessary to the decision of the case and to enable this Court to pass on any question of law involved in this suit.

III. The appellant is not entitled to interest, for if this suit is being prosecuted on the theory of a requisitioning of the seventeen vessels, the appellant as the owner of only two at the time of the acquisition and as the assignee of merely the claims of the owners of the other fifteen has no standing in this Court under Revised Statutes, Sec. 3477; and if this suit is based on the bill of sale, no interest is chargeable against the United States, especially where the amount ultimately recovered by the owner does not exceed the amount actually tendered to him under an appropriation therefor.

ARGUMENT

If this case were to receive the treatment it deserves, the appellant's brief would be stricken from the file and the appeal dismissed.

There is but one point made in the brief worthy of discussion, and that relates to the question of interest as a part of just compensation. The greater part of the fifty pages of appellant's brief are devoted to incoherent railings at the Court of Claims, to distortions of the findings of that court, to statements wholly unsupported by the record, to the discussion of evidence in disregard of the explicit rule that on an appeal from the Court of Claims this Court will consider only the findings, and to the assertion that the rule of this Court that the findings and not the evidence shall be included in the record certified by the Court of Claims is "unconstitutional."

We will pass over this mass of irrelevant matter, to deal only with the points meriting discussion.

I

THE JURISDICTION OF THIS COURT MAY ONLY BE SUSTAINED BY A DISTORTED VIEW OF THE STEPS TAKEN BY THE APPELLANT

The appellant could, with advantage, have devoted a portion of its brief to explaining whether this case has been properly appealed. The judgment was entered April 28, 1924. The next step was on June 26th, when the appellant filed season-

ably, within the sixty days allowed by the rules of the Court of Claims, a motion for a new trial, which was entertained by that court. This motion, seasonably made and entertained, took away the final character of the judgment, which had been previously entered, and rendered it unappealable until the motion was denied or withdrawn. *United States* v. *Ellicott*, 223 U. S. 524, 539. Notwithstanding this situation, while the motion for a new trial was under advisement and undisposed of, the appellant filed on July 24th an application for an appeal. Unless that action is treated as an abandonment of the motion for new trial, it was inoperative and premature as an appeal, because the judgment was not final while a motion for a new trial was pending. It is the application for appeal, and not the order allowing it, that constitutes the taking of the appeal. *United States* v. *Adams*, 6 Wall. 101, 109:

> In other words, the framers of the rule, treating the appeal as taken within the meaning of the statute when the application is made for its allowance, provide that the delay in making out a proper statement of facts and judicial rulings, and then allowing the appeal (which C. J. Taney says, in *Hudgins* v. *Kemp*, " is merely an authority to the clerk to transmit the record "), shall not operate to defeat the appeal.

That the attempted taking of the appeal in July, 1924, was not intended as a withdrawal and an

abandonment of the motion for a new trial is shown by the fact that the appellant in November, 1924, attempted to take an appeal from the order denying the motion for new trial, and further by its motion in this Court to remand, with a direction to the Court of Claims to reconsider the motion for a new trial and for amended findings.

On October 20, 1924, the Court of Claims, disregarding the fact that the notice of appeal was premature and ineffective, entered an order allowing the appeal. This could have no more effect than an order allowing an appeal in a case where the application for appeal was made before any judgment was entered.

The appeal of November 13, 1924, states that it is "from the order herein made on October 20, 1924, denying and overruling motion of plaintiff for a new trial." That order was not, of course, appealable. If that notice of appeal is construed as intending to take an appeal from the judgment as made final and "entered" for the purpose of appeal, by the order of October 20th denying the motion, the jurisdiction could be sustained.

In *United States* v. *Ellicott*, *supra*, it appears, at page 538, that a judgment was entered in May, 1908; that a motion for a new trial, made by the United States, was overruled January 4, 1909; that the United States thereupon gave notice of appeal "from the judgment rendered in the above entitled cause on the fourth day of January, 1909."

This was construed as an appeal from the judgment which attained finality January 4, 1909.

In the present case, however, the appeal of November 13th makes no reference to any judgment and was palpably intended to effect an appeal from an order denying the new trial. It is not a violent assumption that the appellant was unaware that such an order was unappealable.

It thus appears that the jurisdiction of this Court may only be sustained, either by assuming an intent on the part of the appellant to withdraw its motion for a new trial by the filing of a notice of appeal in July, 1924, or by assuming an intention on the part of the appellant by its appeal of November 13th not to have attempted an appeal from the order denying the motion for a new trial. Both of these assumptions are violently contradicted by the record.

II

THE MOTION TO REMAND IS WITHOUT MERIT

There is a finding on every material issue necessary to enable this Court to decide the case. The manifest object of the motion to remand is to give the appellant the benefit of a new trial and to direct the Court of Claims to give more weight than it has previously given to the appellant's evidence.

The Court of Claims has not failed to make a finding on any essential issue. There is no finding covering a mixed question of fact and law which requires separation by the Court of Claims.

The contention that the Court of Claims did not exercise an independent judgment as to the value of the vessels but abdicated its function by relying on findings of the Board of Appraisal is without substance. There was a finding by the court as to the amount of just compensation. The judgment of the court as to the amount coincided with that of the appraisers. What appellant seems to object to is the statement in the opinion of the Court of Claims that (R. 10):

> Upon a careful review of all the evidence in this case we have reached the conclusion that the valuation placed upon the tugs and barges of the plaintiff by the Board of Appraisal is a fair one, and that the compensation awarded by the President is just.

This shows only that the court, on the evidence before it, reached the same conclusion as the Board of Appraisal.

III

THE APPELLANT IS NOT ENTITLED TO INTEREST

The Navy Department, acting through its officers, pursuant to the Act of June 15, 1917, carried on negotiations with the appellant for the acquisition of these seventeen vessels. It had the Board of Appraisal of the Navy Department appraise and determine their value.

On October 12, 1917, it took possession of the five tugs, and on October 18, 1917, of the twelve barges. If the acquisition of these vessels was a requisition-

ing, the title of the Government in and to the tugs and barges vested upon the dates of their taking—October 12 and 18, 1917. On these dates all title of the former owners was divested.

On the dates of the actual taking of possession the appellant was the owner of only one tug, tug *No. 5*, valued at $184,091, and one barge, the *Seneca*, valued at $68,182. Title to the remaining fifteen vessels was in the individuals named in Finding IV, members of the Luckenbach family. On October 19 and 24, 1917, these individuals executed bills of sale for these vessels to the appellant.

If the acquisition of these vessels by the United States was a requisitioning, these individual owners had no title in the vessels to assign by the bills of sale. They did have claims against the United States for compensation. These attempted assignments were ineffective as transfers of title. At most they would constitute an attempt to assign the owners' rights to claim compensation from the United States for the taking of the vessels. As an attempt to assign such claims, they are invalid as made in violation of Section 3477 of the Revised Statutes. This section reads as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment

> of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgements of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

Therefore, if the acquisition of these vessels amounted to a requisitioning, the appellant had a right to just compensation for the value of only one tug, tug *No. 5*, valued at $184,091, and one barge, the *Seneca*, valued at $68,182. Since the appellant has been paid the sum of $1,125,000, it has been paid by the Government a sum largely in excess of just compensation for such tug and barge, including all interest that could be properly allowable thereon. The Government is satisfied with this view of the case, as the statute of limitations has run against the individuals.

The only theory upon which the appellant can recover for all of the tugs and barges, only two of

which it owned when the Government took possession of them, is that the negotiations preceding the acquisition of these vessels brought about a sale and not a requisitioning.

In the first letter, dated October 4, 1917, from the Secretary of the Navy to the appellant with reference to these vessels, the appellant was directed to deliver the vessels to the Commandant of the Third Naval District, was informed that the President had determined just compensation for the vessels, and that the Commandant had been ordered to pay the appellant $1,500,000 " upon proof of ownership " and upon the execution by the appellant and delivery to the Commandant " of formal bill of sale of said vessels and their equipment." (R. 7.) On October 8, 1917, the Secretary of the Navy in directing the Commandant to take possession of the vessels authorized him " to pay to the owner, Luckenbach S. S. Company, upon satisfactory proof of ownership " and only upon the execution by the company and delivery to him " of formal bill of sale of said vessels and their equipment, acknowledging the receipt in full of just compensation therefor, a sum of one million five hundred thousand dollars ($1,500,000.00), and a further sum in payment for ordinary consumable stores." (R. 7.) The Navy Department took possession of the vessels on October 12 and 18, 1917.

The several individual owners on October 19 and 24, 1917, executed bills of sale for their several interests in these vessels to the appellant. And on

October 27, 1917, the appellant executed and delivered to the United States the bill of sale set forth in Finding III. (R. 8–10.)

The facts may require the conclusion that a sale and not a requisitioning was developed by the negotiations had between the parties, and that in fact they resulted in a sale of these vessels by the appellant to the United States. The statute authorized a purchase as well as a requisition. A bill of sale was unnecessary to vest title in the United States, if a requisitioning was intended.

This suit may, therefore, be upon the express agreement by the United States to pay the value of these vessels as of the date of the taking, and interest may not be added because of Judicial Code, Section 177. Treated as a purchase, the contract should be construed to obligate the United States to pay the fair value of the vessels at the time of the taking. That was the only matter in dispute. The appellant stated in the bill of sale that it was "dissatisfied with the *value placed thereon* by the President." (R. 8.) The case of *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, had not then been decided. The matter of inclusion of interest as part of compensation was not in the minds of the parties and was never mentioned directly or indirectly in the bill of sale.

If the contract had bound the United States to pay forthwith $1,500,000 for the vessels as their value, no interest could have been charged against the United States for the failure to pay promptly,

because under Judicial Code, Section 177, the United States is not obliged to pay interest unless expressly agreed upon. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *North American Co.*, 253 U. S. 330. The same principle applies where the contract was not for a stated sum but for the reasonable value. Treated as a requisitioning, the appellant was entitled to pay for two vessels and has been paid for seventeen. Considered as a contract of purchase no interest can be included on the purchase price, as none was expressly provided for.

An additional ground appears for not allowing interest. The finding of the Court of Claims was that just compensation " is the sum of $1,500,000." A fair view of this finding is that the court meant that $1,500,000 represented the value of the vessels at the time of the taking. Under the decision of this Court in *Seaboard Air Line Ry.* v. *United States*, *supra*, under ordinary circumstances, just compensation is not provided by a payment, at a date substantially later than the date of taking, of the value at the time of the taking without interest.

The rule announced in that decision should not, in the case of the United States, be so rigidly applied as to require interest to be calculated and added up to the very moment when the payment is made. The ordinary machinery for the payment of Government obligations will not, as a practical matter, permit of such an application.

The routine covering Government expenditures, the auditing of vouchers, the issuance of warrants, etc., makes it difficult and practically impossible to include interest up to the very moment that payment is actually made; and if that strict view of the *Seaboard Air Line Railway* decision is to be accepted, there will hardly be a case in which the United States can pay just compensation. With this in mind, it may fairly be said that the payment, with reasonable promptness after the taking, of the value at the time of the taking, the delay only resulting from the ordinary formalities and verification of ownership, does not require the inclusion of interest. On this view the short delay occurring after the taking, until the $1,125,000 was paid, should not require the addition of interest on that sum.

With respect to interest on the balance of the compensation, $375,000, it may be said that in a case where the United States has determined upon compensation which is in fact just, and offers to pay it at the time of the taking, and an appropriation is available, and a disbursing officer is actually directed to pay it, and it appears no actual coin or money or check was tendered or offered, because the owner of the property being advised of the amount to be paid serves notice that he will refuse to accept it, the Government should be relieved from that time on of the payment of interest, with the same effect as if gold coin in the required amount had been physically offered. If this be not so, then in any case in which the Court of Claims

does award just compensation, the claimant who refuses to take the sum awarded and delays the payment by an unsuccessful appeal to this Court would be entitled to interest pending the appeal in order to give him full compensation, although the Government was at all times ready to satisfy the judgment.

The reasons and theory back of the rule that where a tender of payment has been made and kept open of the amount which is actually due the debtor will thereafter be relieved from the payment of interest apply with full force and effect to the situation which we are now considering. The United States offered to pay all to which the appellant was entitled. Interest as damages is allowed upon the theory that by the detention of the money the creditor has suffered. If he has suffered here, it is his own fault. He could have had the money and had the use thereof all during the time for which he claims interest. The United States should not be made to suffer this loss because of the unjustified and unfounded claims of the appellant.

At the time these vessels were taken there was in existence the Naval Emergency Fund created by the Appropriation Act of June 15, 1917, *supra*. This Appropriation Act set aside sufficient funds for the purposes therein specified. This sum of money was separated and set apart from the other funds of the United States which were unappropriated and in the Treasury. When these vessels were taken and the President determined

the just compensation therefor, a liability was created upon this appropriation to the extent of that determination, and in view of the fact that the general statutes of the United States then in existence prohibited officers of the Government from expending money without an existing appropriation, the creation of the liability for one and one-half million dollars under this requisition was by operation of law a further segregation and separation and setting apart of this amount and this sum from the funds of the United States. It then and thereby became impossible for the Government to use this sum so appropriated until the charge upon such appropriation had been removed.

While no proof was offered to show that $375,000 of the appropriation has been kept available in the Treasury, the Court should assume that the requirements of the law have been fulfilled.

It is therefore submitted that as above stated all the reasons for the application of the rule that tenders kept open prevent the accruing of interest apply to the instant case.

The appeal should be dismissed or the judgment affirmed.

Respectfully submitted.

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FEBRUARY, 1926.

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